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Reports of Malaysian and Singapore Cases

DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND

ON APPEAL THEREFROM TO THE YANG DI-PERTUAN AGONG OF MALAYSIA

AND THE PRESIDENT OF THE REPUBLIC OF SINGAPORE

FOR THE OPINION OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

**McGOWAN & ANOR. v. WONG SHEE FUN A
& ANOR.**

[O.C.J. (Azmi J.) June 27, 1965]

[Johore Bahru — Civil Suit No. 81 of 1963]

*Tort — Negligence — Indiscriminate stripping of
top soil of land — Heavy rains — Flooding — Erosion
— Damage to adjacent property — Nuisance — Damages.*

This was a claim for damages against the defendants for negligence and nuisance. The first defendant was at all material times the owner and developer of land known as Jalan Water Works Estate. The second defendant was the owner and developer of land adjacent to the first defendant's land. It was alleged against the first and second defendants that they had indiscriminately stripped off the top soil of their lands and so caused and allowed the stream to become silted due to the resulting erosion of the land and also caused or allowed the river to become silted by earth and material being washed down to the lower reaches from their land. As against the first defendant it was also alleged that he constructed across the river a culvert which was so designed as to be inadequate to cope with the water that was likely to flow down the stream during or after heavy rainfall.

Held: (1) on the evidence the flooding which caused the damage to the plaintiff's property occurred because the water that flowed down the stream was prevented from flowing down to the sea by the culvert because the pipes of the culvert had been blocked mainly by the fine earth or silt and partly by the branches of trees and other debris;

(2) the first defendant by constructing the culvert created the potential nuisance and as occupier of the land upon which the nuisance was created, he was liable as he continued the nuisance;

(3) both the defendants were negligent in stripping off the top soil of their respective lands without taking all reasonable steps to prevent fine earth from being washed down the sides of the slopes into the stream and the second defendant was negligent in allowing debris and pieces of timber to be washed down into the stream;

(4) although the negligent act of each party by itself would cause no damage to the plaintiffs, their combined acts had caused damage to the plaintiffs and therefore they should be made liable and in the circumstances the damages should be apportioned equally between them.

Cases referred to:—

(1) *Pemberton & Anor. v. Bright & Ors.* [1960] 1

All E.R. 792.

(2) *Greenock Corporation v. Caledonian Rly. Co., Greenock Corporation v. Glasgow and South Western Rly.* [1917] A.C. 556, 572.

(3) *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 903.

(4) *Blair and Sumner v. Deakin, Eden and Thwaites v. Deakin* (1887), 57 L.T. 522.

(5) *Thorpe v. Brumfitt* (1873), 8 Ch.App. 656.

CIVIL SUIT.

T. G. Sim for the plaintiffs.

Omar bin Salleh for the first defendant.

Dato' D. C. Jackson for second defendant.

Cur. Adv. Vult.

Azmi J.: This is a claim for damages against the two defendants for negligence and/or nuisance.

The 1st defendant was at all material times the owner and developer of land known as Jalan Water Works Estate which is adjacent to a stream known as Sungei Chat, on the opposite side of which stream the plaintiffs' residence is situated.

The 2nd defendant was at all material times the owner and developer of land adjacent to the 1st defendant's land.

The particulars of negligence alleged against the 1st defendant were in that he indiscriminately stripped off the top soil of his land and so caused and allowed Sungei Chat to become silted up due to the resulting erosion of the land, and he also caused or allowed the said Sungei Chat to become silted up by earth and materials being washed down to the lower reaches from his aforesaid land.

The same allegations are made against the 2nd defendant.

As against the 1st defendant it was also alleged that he constructed across the said Sungei Chat a culvert which was so designed as

to be inadequate to cope with the water that was likely to flow down the Sungei Chat during or after heavy rainfall.

The 1st defendant denied that he had indiscriminately stripped off the top soil or that he had caused Sungei Chat to become silted and, in reference to the construction of the culvert, said that it was constructed according to a plan approved by the Town Council, Johore Bahru. He further alleged that the flooding was caused by the said culvert being clogged by building materials negligently kept by the 2nd defendant on its land which said materials the 2nd defendant negligently allowed to escape from the land into Sungei Chat.

The 2nd defendant also denied the allegations of negligence alleged against it. The 2nd defendant further stated that the only building material belonging to it had been lying outside a dwelling house in the course of construction at a point more than 11½ feet above the bed of the river so that these planks did not become water borne until after the time when all the damage to the plaintiffs' property due to such flood had already occurred. It also said that the flooding and any loss or damage to the plaintiffs arising from it was caused solely by the culvert which, owing to its shape, inadequate size and inexpert construction, seriously obstructed the flow of the river and was unable to cope with the sudden spate caused by the heavy rain on the evening of the 25th February, 1963.

It is not denied by the defendants that heavy rain fell on the night in question and that damage has been done to the plaintiffs' property by the waters of the flood.

The question of quantum has been agreed to by the parties, namely \$2,500, so that I merely have to decide on the question of liability. Mr. Omar Salleh suggested that the issues be as follows and there has been no comment as to these suggestions. I agree with them too, that is to say:

- (1) Whether there was any liability at all proved against any defendant?
- (2) If only one of the defendants is liable?
- (3) Whether both are liable?
- (4) If both are liable, the degree of liability of each?

I will now refer to the evidence produced by each party.

P.W.1, Mr. Duncan, senior executive engineer, Public Works Department, Johore, stated that after he assumed duty as senior executive engineer, he wrote a letter, Exhibit P.1, on 22nd January, 1962, to the 2nd defendant, and a similar one to the 1st defendant a few days later. The letters consisted of his

A complaint against the silting of Sungei Chat by fine earth which was carried by rain water down the slopes of the defendants' lands into the river. In September, 1962, photographs of the scene were taken to show the seriousness of the silting and he also requested that the matter receive the immediate attention of the two defendants. B Nothing, however, was done up to the time of the flooding which occurred on 25th February, 1963. Mr. Duncan was at the scene during the flooding. The stream swollen by rain water which fell heavily during the day could not pass through the culvert because the two pipes were blocked. C

In his opinion the flooding was due to the culvert being partially silted up with soil to the extent of about 60 per cent of its area before the flooding occurred and by the culvert being completely blocked by floating debris during the flooding. The debris consisted mainly of planks and timbers from the building site of the 2nd defendant. It was, therefore, his opinion that the silt and debris, which blocked the culvert, came mainly from the 2nd defendant's site. Only some silt from the 1st defendant's land contributed in blocking the culvert. He estimated that 70 per cent of the silt found at the culvert came from the 2nd defendant's site and 30 per cent from the 1st defendant's site. He based this on the frontage and area of land north of the culvert. D

In this connection Mr. Kothagoda, P.W.4, who was also at the scene during the flood, said that the next morning, when the flood had subsided after the wings to the culvert had been broken and trenches dug near the culvert, he found that one of the twin pipes of the culvert was blocked by a tree trunk, that there were some branches and roots of trees near the pipes of the culvert, and that there was a big amount of silt. E

According to P.W.2, Mr. Osman, who was a technician (roads) of the Public Works Department, Johore Bahru, he had photographs (Exhibit P.6A to P.6K) taken on 3rd September, 1962. These photographs give a vivid picture of the condition of the silting about 5 months before the flood. I would like to say here that the condition as to silting would appear to be as serious on the day of the flooding as was indicated in the photographs in September, 1962. F

The 1st defendant, Dato' Wong Shee Fun, to call him by his right title, stated that he employed Lee Tuan Chai, D.W.3, to clear the land and that his land in question was cleared by May or June, 1961, but he had not started constructing the houses until February, 1963. In cross-examination he said he did not observe that his culvert had become ineffective by reason of the silting. Neither did his architect tell him so. He admitted having been shown the letter from I

Mr. Duncan and he gave instructions to his architect, Mr. Henry Loo, to attend to it.

Now Mr. Henry Loo, D.W.2, said that he was given instructions to prepare for the development of the 1st defendant's land which included the building of the culvert across Sungei Chat. The plan was approved by the Town Council. In his opinion the culvert was adequate to deal with the flow of water along Sungei Chat in heavy rain. He was at the scene in the morning after the flood. He saw a lot of building debris, shuttering planks, tree branches blocking the culvert when the water was about 4 feet high above the bed level of the sungei. His opinion was that the culvert was blocked by planks and tree branches up to 90 per cent. He was at first of the view that the flooding was entirely due to the blocking of the culvert with debris. In answer to cross-examination, however, he admitted that it was the combined blocking by silting and other material that caused the flooding of the area.

D.W.3, Lee Tuan Chai, said that he built the culvert for the 1st defendant. He said that the land was virgin secondary jungle which gradually slopes from a hill top down to the sungei. He made terraces for building purposes. Turfing was done on the slope in front of the buildings. He said that only a little bit of earth was carried down the slope and he also said that the two pipes of the culvert are resting on the bed of the river so that the bottom parts of the pipes are level with the bed and the walls of the culvert were built just over the pipes. He was asked as to the materials shown in photograph Exhibit P.6J, and he said he left materials similar to those on the land, and for all he knew they might still be there on the night of the flood.

D.W.4, D.W.5 and D.W.6 gave evidence for the 2nd defendant.

D.W.4, Mr. Pestana, a qualified architect employed by the 2nd defendant, said that he carried out house projects on 2nd defendant's lands in question. Development started in 1960. He prepared a lay-out plan and building plan which was subsequently approved by the Town Council.

In January, 1962, the 2nd defendant showed him Exhibit P.1 and as a result, among other things, he did the desilting of Sungei Chat and close turfing the banks. The full length of the stream was close turfed and the collapse of the bank was restored. He said the close turfing would be effective only after 4 or 5 months after turfing. He also said that there was building going on from September to December, 1962, and January to February, 1963, and it was possible some planks were left in February, 1963, before the flooding though he did not think that the planks could be carried down into Sungei Chat.

A The frontage of the 2nd defendant's land along Sungei Chat measured 740 ft. and all the land had been cleared of vegetation for the purpose of development. He agreed that it was not the proper way to leave branches and trunks of trees on the bank ready to be washed down the river. He agreed that in January, 1962, he saw some debris, earth, stones and even empty tins in the stream. He, however, did not think that the silting was a serious case of silting. He also did not think that it is a case of erosion when shown photograph Exhibit P.6B.

B
C Now D.W.5, Lim Kim Chan, foreman of works employed by the 2nd defendant, said that the developments of the land of the 2nd defendant were carried out in two phases — the first phase was completed in 1961 and was followed by the 2nd phase which was completed in May or June, 1963. By that time 77 houses had been completed. He was shown Exhibit P.1 by Mr. Pestana and was told to clear the silt and branches of trees found in bed of the river and close turf the banks which he did, and he completed it in August, 1962. He also said that the collapse of banks as shown in the photographs have been repaired. Before February, 1963, during heavy showers some branches of trees were carried down into the river but not building materials. He suggested that some of the branches found in the river came from the jungles beyond the 2nd defendant's land.

D
E D.W.6, Mr. Bruyns, who lived at No. 38B, Jalan Water Works, a house in the same row as the plaintiffs, said that he was in the house when the flood started and he saw grass and fishing traps coming down the stream. He also assisted people in removing floating planks in the water. Some got stuck at the walls of the culvert and some floated away.

F
G On the evidence before me I would say that the flooding, which caused the damage to the plaintiffs' property, occurred because the water that flowed down Sungei Chat was prevented from flowing down to the sea by the culvert because the pipes of the culvert had been blocked mainly by the fine earth or silt and partly by branches of trees and other debris. In spite of what witnesses for the defendants have said to the contrary, I am inclined to think on the balance of probabilities that the branches of trees came from the 2nd defendant's land. In this respect I like to say that I fully keep in my mind that the conditions of the land in reference to branches of trees on the bank as shown in the photographs produced existed a few months before the flooding. I also find on the evidence that the blocking of the pipes was mainly by silting and to a less extent by branches of trees and other debris. I am inclined to agree with Mr. Duncan's estimation at 60 per cent. due to silting and 40 per cent. due to debris. Again

I have no doubt that just before the flooding silting had been going on in spite of what Mr. Pestana and the foreman of works for the 2nd defendant have stated to the contrary, and that most of the silting came from the 2nd defendant's lands. Again, I am inclined to agree with Mr. Duncan's estimation that 70 per cent. of the silting came from the 2nd defendant's land and 30 per cent. from the 1st defendant's land. I also think that the twin pipes are too small for the purpose of carrying away the water after heavy rains. I have been to see the land and there is a bridge across the stream further upstream, a few hundred feet from the culvert. Apparently this is an ordinary bridge with no pipes underneath it and apparently no flooding has been caused by the bridge during heavy rains. If a bridge like this one had been built instead of the culvert, the flooding would not have occurred.

On the question of nuisance both Mr. Sim and Dato' Jackson submitted the case of *Pemberton & Anor. v. Bright & Ors.*⁽¹⁾ In this case the defendants were the county council and the occupiers of the land where the culvert stood. It was held in that case that the county council were liable for constructing the culvert without a protecting grid, and they therefore created a potential nuisance which became an actual and actionable nuisance when the culvert became blocked so that it dammed the water flowing in the stream and diverted it on to the plaintiffs' land. The occupiers of the land were liable for having continued the nuisance. Dato' Jackson went on to say that in the present case before me it was the 1st defendant who built the culvert and occupied the land so that he alone would be liable.

Lord Finlay L.C. in *Greenock Corpn. v. Caledonian Rly. Co., Greenock Corpn., v. Glasgow & South Western Rly. Co.*⁽²⁾ stated as follows:

"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."

In this case the 1st defendant himself created this potential nuisance and as an occupier of the land upon which the nuisance has been created, he is liable as he continues the nuisance.

"The ground of responsibility," said Lord Wright in *Sedleigh-Denfield v. O'Callaghan*⁽³⁾ "is the possession and control of the land from which the nuisance proceeds." For this reason in my opinion the 2nd defendant cannot be liable for this nuisance although he was responsible partly for the blocking of the culvert, but in my opinion allowing the silt to be carried down into the river bank did not involve the use of the land where the nuisance was.

A On the question of negligence, it is my view on the facts that both defendants were negligent in stripping off the top soil of their respective lands without taking all reasonable steps to prevent the fine earth from being washed down the sides of the slopes into the stream, and that the 2nd defendant was negligent in allowing debris and pieces of timber to be washed down into the stream. Although it is my view on the facts that the culvert itself, by itself without the blocking by silt and debris, would not have blocked the flooding waters of the stream to such an extent as had happened in this case, I am also aware that the silting of the river to the extent occurring on the day or days before the flooding and the debris itself would not have caused the waters of the stream to rise to the extent it had done if there was an ordinary kind of bridge across the stream because it was apparent that the 2nd defendant's bridge further up the stream had not caused or contributed to the flooding of the area. So that we come to the position that so far as the question of negligence is concerned, neither party by its negligent action alone would have caused the flooding, but I think I am right in saying that in law though the negligent act of each party by itself would cause no damage to the plaintiffs, but that where their combined acts had caused damage to the plaintiffs, they should be made liable. This principle in my view is illustrated in the judgment of Kay J. in *Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin*,⁽⁴⁾ see 36 *English & Empire Digest*, page 318, para. 635 (Replacement Volume). This, of course, is a case of nuisance and this is what Kay J. said:

"...now, is it the law that, supposing it is impossible to say that any one of those persons [i.e., manufacturers higher up the stream] pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say, 'You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage.' All I can observe is that, in my opinion, it would be a most unjust law if there were such a law. Were the case absolutely new, and my individual opinion had to be given upon it, I still should say distinctly that that was not the law. A man is not bound to sue anybody until he finds that he is being injured. . . . Has he no remedy because each one of them can say: 'It was not my doing. I only contributed a part, and the part I did contribute was not enough to do you damage'?"

Again, James L.J. in *Thorpe v. Brumfitt*⁽⁵⁾ which was a right of way case, said:

"The plaintiff cannot complain, unless he can prove an obstruction which injures him. The case is not like one of trespass, which gives a right of action though no damage be proved. In the present case, I cannot come to any other conclusion than that arrived at by

the Master of the Rolls, that the right of access to the inn-yard has been interfered with in a way most prejudicial to the plaintiff. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy waggons. If a person who was going to put up his horses at the inn was stopped by the loading or unloading of waggons, he would probably at once go to another inn. Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

I think in applying the principles of those two cases, although they deal with different torts, I would say that though in this case individually the acts of each defendant are not sufficient by themselves to cause the damage done, the acts of both the defendants having caused the damage to the plaintiffs, they should therefore be liable.

The next point is how I should apportion the liability. Although the bulk of the silting and most of the debris came from the 2nd defendant's land, I am inclined to apportion the damages on a 50 — 50 basis. There will, therefore, be judgment against both defendants for the plaintiffs for \$2,500 and costs.

Judgment accordingly.

Solicitors: *Drew & Napier; M. Ismail & Co.; Donaldson & Burkinshaw.*

MOHAMED IKHAWAN v. JOHAR & ANOR.

[O.C.J. (Ong F.J.) July 7, 1965]

[K.L. — Civil Suit No. 806 of 1963]

Damages — Personal injury — Loss of binocular vision of left eye — Assessment of damages.

The plaintiff an infant just under 14 years lost the binocular vision of his left eye in a road accident. The infant was of rather under-average intelligence and had been working in his father's paddy fields since he was 13 years old, rather than continuing in school after standard five in Malay. There was no evidence of his earning any wages beyond what a parent ordinarily provides for a child of the necessities of life. He was no less able after the accident to perform with the aid of one eye all the tasks he had been doing before the accident.

Held: that a sum of \$12,500 was adequate. This sum was intended to bring him a steady income for life and to cover also a degree of pain from all injuries sustained in the accident, further discomfort and cosmetic deformity.

A Cases referred to:—

- (1) *Warren v. King* [1964] 1 W.L.R. 1; [1963] 3 All E.R. 521 and 793.
- (2) *Dimmock v. British Railways Board* (1965), *The Times*, June 30, 1965.

CIVIL SUIT.

B *H. E. Cashin* for the plaintiff.

Au Ah Wah (Treasury Solicitor) for the defendants.

Ong F.J.: The plaintiff lost the sight of his left eye in a road accident on January 29, 1963, when he was just under 14 years old, and I awarded him \$12,500 as general damages, in addition to the sum of \$231 by way of special damage and costs to be taxed.

I had given the matter of quantum of damages careful thought overnight when reserving judgment till the following day. I bore in mind the principles enunciated by their Lordships in *Warren v. King*,⁽¹⁾ that "awards must be reasonable and assessed with moderation", that what is fair and reasonable "should meet the plaintiff's requirements", that "damages must not be assessed on the basis that everything in life would go most favourably for a plaintiff whose future has been affected by injury" and that fair compensation should be "fair as between the negligent person and his victim. Not punishment of him, but what he ought in fairness to pay."

Passing from the general to the particular, my observation of the boy led me to conclude that he is a person of rather under-average intelligence. Confirming this is the fact that he and his parents thought that he could be of better service working in his father's paddy-fields at 13 than continuing in school after standard five in Malay, with some thought for the future.

There was no evidence of his earning any wages beyond what a parent ordinarily provides to a child of the necessities of life. In an agricultural community, where this boy has lost interest in the benefits of education, I think his lot in every likelihood is that of a farmer when he grows up. I am not bound, nor do I feel inclined, to speculate on what he might possibly become, should "everything in life go most favourably for him." To a farmer the loss of an arm or a leg by amputation is, in my view, far more serious than loss of vision of only one eye, when the other is unimpaired.

It is true that sight is precious. But what was lost here is not his sight altogether, but only binocular vision, which I do not think will in any way affect his earning capacity. Loss of binocular vision would be disastrous for a surgeon who has to perform delicate operations. Even a watch-repairer constantly applies only